UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Robert E. McClellan, Appellant,

v.

Department of Defense, Agency.

Docket Number NY122190W0254

Date: February 26, 1992

Michael H. Sussman, Goshen, New York, for the appellant.

Wayne G. Carter, Jr., New York City, New York for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency petitions for review of the initial decision, issued June 21, 1990, that reversed the appellant's reassignment from the position of Supervisory Management Analyst, GM-14, to a position of Management Analysis Officer, GM-14. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still REVERSING the appellant's reassignment. In addition, we DENY the appellant's motion for compliance with the administrative judge's interim relief order.[1]

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[1] In *Ginocchi v. Department of the Treasury,* 53 M.S.P.R. 62, 68 n. 4 (1992), the Board held that the sole remedy available to an appellant who believes that the agency has not complied with an order to provide interim relief is to file a motion to dismiss the agency's petition for review. We find no basis for granting such a motion in this case. Here, although the agency declined to return the appellant to his former position while its petition for review was pending, it explained that to do so would be unduly disruptive.

BACKGROUND

In the initial decision, an administrative judge with the Board's New York Regional Office found that the appellant had timely refiled his individual right of action (IRA) appeal,[2] under the Whistleblower Protection Act of 1989, in which he had challenged his reassignment. The administrative judge found that the Board had jurisdiction over the appeal under 5 U.S.C. § 1221(a) because the appellant made a nonfrivolous claim that he was reassigned in retaliation for whistleblowing activities as defined in 5 U.S.C. § 2302(b)(8), showed that he was appealing a personnel action as defined by 5 C.F.R. § 1209.4(a)(4), sought corrective action from the Office of Special Counsel (OSC), and exhausted the OSC proceedings as required by 5 U.S.C. § 1214(a)(3).

The administrative judge set forth the background of the appellant's appeal as follows: The appellant worked for the Defense Contract Administration Services, New York Region (DCASR-NY).[3] In December 1986, he was reassigned to the position of Director (Supervisory Management Analyst) of the Office of Policy and Plans (OPP), GM-14, from the position of Personnel Officer, GM-14. OPP was responsible for conducting organizational effectiveness studies and administering a number of other programs. In February 1988, Brigadier General John M. Thomson became Commanding Officer of DCASR-NY, and in October 1988, Major Peter Kafkalis became the appellant's immediate supervisor.[4]

On February 3, 1989, Major Kafkalis informed the appellant that he would be detailed for 120 days to an unestablished position responsible for coordinating all facets of the transfer of agency employees to the Defense Finance Center in Columbus, Ohio. Effective June 20, 1989, General Thomson extended the detail

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Petition For Review File (PFR File), Tab 2. The appellant is receiving pay, compensation, and benefits at the GM-14 level in his present position. *Id.* Because the appellant has not shown that the agency acted in bad faith in declining to return him to his former position, we find that the agency acted within its discretion in effecting interim relief. *See Ginocchi,* at 68-71.

[2] The appellant's first appeal was dismissed pursuant to a settlement agreement; his second, pursuant to the parties' joint stipulation. *McClellan v. Department of Defense,* MSPB Docket No. NY122190W0054 (Initial Decision, Dec. 11, 1989); *McClellan v. Department of Defense,* MSPB Docket No. NY122190W0140 (Initial Decision, Feb. 28, 1990). The administrative judge incorporated the records of those appeals into the current appeal. Initial Appeal File, Tab 8.

[3] We note that this entity is now known as the Defense Contract Management Region-New York. Initial Decision (I.D.) at 2 n. 2.

[4] Major Kafkalis is now a Lieutenant Colonel. I.D. at 3 n. 4.

for another 120 days. Effective October 10, 1989, the appellant was reassigned to the newly created position of Management Analysis Officer, GM-14, a deputy director position in OPP. The appellant asserted that this reassignment was in reprisal for his protected disclosures.

The administrative judge reviewed the documentary and testimonial evidence at length. Specifically, he noted that the appellant wrote a letter to Congressman William Green on February 13, 1989. In the letter, the appellant claimed that his detail was in retaliation for speaking out against fraud, mismanagement, and inflated classification and position management programs. He claimed that in the previous year, the agency created and reclassified positions costing about $2,000,000 with no effective controls or consideration of the impact on the Federal budget. He stated that his attempt to offer reasonable alternatives met with violent reactions from the military commanders. He also asserted that General Thomson had detailed him to the unestablished position in reprisal for his allegations and his complaint with OSC, in which he had contended that his 1986 reassignment from the position of Personnel Officer to Director of OPP was based on reprisal and prohibited personnel practices. Initial Decision (I.D.) at 10-11; *see also* Appellant's Exhibit Y (File in MSPB Docket No. NY122190W0140, Tab 8).

About March 22, 1989, the Office of Congressional Affairs of the Defense Logistics Agency-Headquarters (DLA-HQ) received the appellant's letter from Congressman Green with a note from the Congressman stating, “Thought you might find this of interest.” On April 6, 1989, Major General Charles R. Henry from DLA-HQ, General Thomson's immediate supervisor, responded to Congressman Green. I.D. at 13; *see also* Appellant's Exhibit CCCC (Initial Appeal File (IAF), Tab 13).

In addition, the administrative judge found that between September and October 1988, General Thomson met with General Henry, and Roger Roy, Director of OPP at DLA-HQ, concerning his own proposal to reorganize DCASR-NY operations. General Henry disapproved the part of General Thomson's plan which involved creating two GM-14 positions in separate offices because he believed the additional GM-14 was not justified. I.D. at 7; *see also* Appellant's Exhibit BBBB (IAF, Tab 13).

The administrative judge concluded that the appellant had met his burden of proving reprisal. He first found that the appellant established by preponderant evidence that he made a protected disclosure as described in 5 U.S.C. § 2302(b). Specifically, he found that the assertions the appellant made in the February 13, 1989 letter constituted protected disclosures under 5 U.S.C. § 2302(b)(8). As previously stated, the administrative judge noted that the appellant asserted that DCASR-NY created and reclassified positions costing about $2,000,000 during the previous year without effective controls or consideration of the impact on the

Federal budget. He found that the appellant presented evidence that General Thomson's reorganization would increase personnel costs by an amount that was not de minimis, and thus was sufficient to support the appellant's belief that General Thomson's plan constituted gross waste or gross mismanagement. He noted that General Henry confirmed that General Thomson's plan was “overkill.”

The administrative judge further found that the appellant could reasonably believe that his allegation that his detail was in reprisal for filing an earlier complaint with OSC constituted a disclosure of a violation of law, specifically, of 5 U.S.C. § 2302(b)(9). Thus, he found that the appellant established that he made protected disclosures under 5 U.S.C. § 2302(b)(8) in his letter to Congressman Green. Because of this finding, the administrative judge found it unnecessary to determine whether the appellant's other disclosures contained in his numerous grievances, complaints to OSC, a July 12, 1988 letter to then Secretary of Defense Frank Carlucci, and other written submissions constituted protected disclosures under 5 U.S.C. § 2302(b)(8).

The administrative judge next found that the record showed by preponderant evidence that General Thomson had at least constructive knowledge of the appellant's protected disclosure, i.e., the February 13, 1989 letter, when he reassigned the appellant effective October 10, 1989. The administrative judge acknowledged that General Thomson denied knowing about the letter, the disclosures in the letter, or the Department of Defense's investigation about the disclosures, before he reassigned the appellant. He noted that General Thomson also denied that General Henry had ever talked to him about General Henry's response to Congressman Green's inquiry, and disclaimed knowing that the appellant had ever opposed his reorganization plan. The administrative judge determined, however, that General Thomson's testimony was not credible.

The administrative judge cited the following evidence to support his determination. He found that General Thomson conceded that the normal practice in handling Congressional inquiries concerning DCASR-NY would be for DLA-HQ to refer the inquiry to DCASR-NY for assistance and input in drafting a response. General Thomson also acknowledged that in the ordinary course of business, he reviewed and discussed Congressional inquiries at weekly briefings, and saw copies of DCASR-NY draft replies before forwarding responses to DLA-HQ. Moreover, he conceded that DCASR-NY typically received copies of DLA-HQ's responses to such inquiries. The administrative judge found that given these standard procedures, it was more likely than not that General Thomson had at least constructive knowledge of the appellant's protected disclosures before he reassigned the appellant.

Furthermore, the administrative judge noted that General Thomson's immediate supervisor, General Henry, signed the response to the inquiry, and the draft response was part of a package that contained Congressman Green's

inquiry and the appellant's letter. He found it more likely than not that DLA-HQ would have informed DCASR-NY about the inquiry because the matter concerned a grievance against DCASR-NY by one of its GM-14 supervisors, and specifically accused General Thomson of wrongdoing. He also found it inherently implausible that General Thomson did not know that the appellant, the supervisor responsible for analyzing organizational effectiveness, had opposed General Thomson's reorganization plan, particularly since the appellant's complaints, grievances, and memoranda showed that he was not reticent about expressing his views.

Finally, the administrative judge found that the appellant gave forthright, consistent, and unswerving testimony that he personally informed General Thomson that he opposed the reorganization plan. He also cited Mr. Roy's statement that the appellant expressed concern that General Thomson's plan would result in excessive high-graded positions, that General Thomson had vigorously defended his proposal to Mr. Roy, and that General Henry disapproved of one of the GM-14 positions as unnecessary.

The administrative judge next found that the appellant proved by preponderant evidence that his protected disclosures occurred within such a period of time that a reasonable person could infer that the disclosures were factors in his reassignment. The administrative judge acknowledged the agency's argument that the appellant had already been detailed in February 1989 before he made his protected disclosure to Congressman Green. However, he disagreed with the agency's assertion that the appellant's reassignment could not have been reprisal. In this regard, he found that General Thomson was aware of the appellant's protected disclosures in April 1989 and reassigned him about 6 months later. The appellant gave uncontroverted testimony that during the 6 months and thereafter, he performed none of the duties set forth in General Thomson's September 8, 1989 memorandum, which gave the basis for the appellant's reassignment to the newly created position of Management Analyst Officer, GM-14.

Finally, the administrative judge found that the agency had not rebutted the appellant's prima facie case of reprisal by showing by clear and convincing evidence that it would have reassigned the appellant absent its retaliatory motive.

The agency timely filed its petition for review to challenge only the administrative judge's constructive knowledge analysis.

ANALYSIS

We find that the agency's petition does not provide a basis for Board review under 5 C.F.R. § 1201.115 because it constitutes mere disagreement with the administrative judge's findings and credibility determinations. We have reopened

the case, however, to clarify the initial decision's finding concerning General Thomson's knowledge of the appellant's protected disclosure.

We first find that the administrative judge used the proper legal framework in determining whether the appellant should prevail in his IRA appeal. In such an appeal, an employee must prove by a preponderance of the evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in the personnel action which was taken against him. If the employee makes this showing, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. 5 U.S.C. § 1221(e); *Gergick v. General Services Administration,* 43 M.S.P.R. 651, 659-63 (1990); 135 Cong.Rec. H747 (daily ed. Mar. 21, 1989) (Explanatory Statement on Senate Amendment-S. 20), S.Rep. No. 413, 100th Cong., 2d Sess. 13-14 (1988). Thus, the administrative judge properly considered whether the appellant established that he made a protected disclosure under 5 U.S.C. § 2302(b); whether the disclosure was a factor in his reassignment; and whether the agency proved that it would have reassigned the appellant absent its retaliatory motive.

The agency has not challenged the administrative judge's findings that the appellant made a protected disclosure under 5 U.S.C. § 2302(b) and that the agency failed to prove that it would have reassigned the appellant absent any retaliatory motive and, accordingly, we do not have these issues before us. Rather, it asserts only that the administrative judge erred in finding that General Thomson had the requisite knowledge of the appellant's disclosure.[5]

In this regard, the agency appears to argue, briefly, that the appellant must show that General Thomson had actual knowledge of the disclosure. We note, however, that in *Gergick,* 43 M.S.P.R. at 651, the Board quoted from a joint explanatory statement regarding the Whistleblower Protection Bill in which House and Senate members made the following statement regarding ways to meet the "contributory factor" burden:

> One of the many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the

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[5] We note that the agency has submitted a reply to the appellant's response to its petition for review, in which it seems to contend that the appellant did not prove that he made a protected disclosure. We will not consider the agency's argument because it was not raised in a timely filed petition for review or cross petition for review, and it is not based on evidence that was unavailable before the record closed. *See* PFR File, Tab 3; 5 C.F.R. §§ 1201.114(b) and (i). In addition, our review reveals that, contrary to the agency's implication, it did not raise this issue in its petition for review. *See* PFR File, Tab 1.

> action knew (*or had constructive knowledge*) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

(Emphasis added). Thus, Congress has allowed for the possibility that an individual may establish reprisal by evidence short of actual knowledge of the protected disclosure by the official taking the action.

Here, the agency argues that even if the appellant had to show only that General Thomson had constructive knowledge of the disclosure, he failed to meet this burden because he did not show that anyone with actual knowledge of his disclosure influenced General Thomson's decision to reassign him. The agency cites *Frazier v. Merit Systems Protection Board,* 672 F.2d 150, 166-68 (D.C. Cir. 1982), to support its argument. It also asserts that the administrative judge improperly shifted the burden of proof to the agency to show that General Thomson lacked knowledge.

We reject the agency's assertion that the administrative judge required it to show that General Thomson did not have knowledge of the appellant's disclosure. The agency is simply disagreeing with the administrative judge's findings concerning the sufficiency of the evidence. *See* Petition for Review at 7-8. The agency's unsupported belief that the evidence is inadequate to establish the appellant's case does not show that the administrative judge improperly shifted the burden of proof to the agency.

We agree with the agency that *Frazier* is a constructive knowledge case. In *Frazier,* the court found that an appellant could show that the official accused of taking retaliatory action had constructive knowledge of the appellant's protected disclosure by showing that individuals with actual knowledge of the disclosure influenced the official's action. *Id.* at 166-68. However, the court did not state that this was the *only* way to show constructive knowledge in a reprisal case. Indeed, contrary to the agency's assertion, the court allowed for the possibility that reprisal could be shown by establishing that a person with only constructive knowledge, as opposed to actual knowledge, of an appellant's disclosure influenced the official taking the action against the appellant. *Id.* at 167-68.

In any event, we find it unnecessary to elaborate on the definition of constructive knowledge or to determine how such knowledge can be shown, because the analysis in the initial decision is consistent with a finding that General Thomson had *actual* knowledge of the appellant's protected disclosure.[6]

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[6] We recognize that at the close of the hearing, the administrative judge stated that he had heard no direct evidence of actual knowledge by General Thomson. Transcript at 156-57. However, the administrative judge proceeded to state that this did not "preclude

Specifically, the administrative judge found that although there was no direct proof that General Thomson knew of the protected disclosure, there was sufficient circumstantial evidence to support a finding that he knew of the disclosure. We find that the administrative judge's consideration of circumstantial evidence was proper. *See, e.g., Burkett v. General Services Administration,* 27 M.S.P.R. 119, 121 (1985).

The administrative judge based his conclusion that General Thomson knew of the appellant's disclosure on evidence concerning the usual method of handling Congressional inquiries and on his assessment of the appellant's and General Thomson's relative credibility. We find that the agency has shown no error in the administrative judge's determinations.

The Board must give due deference to the credibility findings of the administrative judge. *Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133 (1980), *review denied,*669 F.2d 613 (9th Cir. 1982) (per curiam). This is especially true when the administrative judge's findings regarding credibility are based on the demeanor of witnesses. *Jackson v. Veterans Administration,* 768 F.2d 1325, 1331 (Fed. Cir. 1985). Here, as previously described, the administrative judge fully set forth his reasons for finding General Thomson's denial of knowledge of the disclosure incredible. I.D. at 22-25. Thus, this is not a case of an unexplained blanket refusal to credit the testimony of an agency witness as to the true reason for the appellant's reassignment. *Cf. NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Although the agency disagrees with this finding, it has not shown error in the administrative judge's finding that given the agency's standard procedures with regard to Congressional inquiries, it was more likely than not that General Thomson had knowledge of the appellant's protected disclosures. I.D. at 22-23. Thus, we find no basis for reversing the initial decision.

ORDER

We ORDER the agency to cancel the appellant's reassignment and to restore the appellant effective October 10, 1989. *See Kerr v. National Endowment for the Arts,* 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

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a finding that there may be circumstantial evidence showing actual knowledge." Tr. at 157. In addition, the administrative judge permitted the parties to submit evidence and argument on the issue of knowledge. Tr. at 157. Thus, we find that the administrative judge did not make any statement at the hearing that prejudiced the agency's presentation of its case. *Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984).

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.